Nos. 14945-14946.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ALFRED LUCKING,

Appellant,

vs.

OJAI MUTUAL WATER COMPANY, a corporation, and THE OJAI VALLEY COMPANY, a corporation.

Appellees.

REPLY BRIEF OF APPELLEES.

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Statement of the Pleadings and Issues.

The original complaint in action 14945 was filed on the 20th day of June, 1951, and the amended complaint on the 30th day of October, 1951. Hereafter in this brief unless otherwise indicated any reference to the complaint means the amended complaint.

The Theory of the Complaint.

1. Summarized the complaint is based upon the fundamental proposition that appellant purchased a total of 70.13 acres of land in the Ojai Valley from Florence Scott Libbey and by reason of the purchase acquired 151 shares of stock in the defendant Ojai Mutual Water Company. [Tr. Rec. V. 1, pp. 5-8].

2. That only those purchasing stock from the so-called Libbey interests are entitled to shares of stock in the Ojai Mutual Water Company and when all the lands owned by

the so-called Libbey interests, as they are referred to in the complaint, have been sold that any stock left over, or remaining, is surplus stock and should be cancelled. [Tr. Rec. V. 1, pp. 8-9.]

3. The Ojai Valley Company is the owner of approximately 1500 shares of stock in the Water Company and by reason of that ownership exercises a controlling interest in the Water Company. [Tr. Rec. V. 1, pp. 11-12.]

4. That no one is entitled to receive water from the Water Company unless the lands to which water is supplied were acquired from the so-called Libbey interests.

5. That the amendment to the Articles of Incorporation of the Water Company requiring one share per acre instead of four shares per acre is invalid by reason of the fact that no notice of said amendment was given as required by law. [Tr. Rec. V. 1, pp. 8-9.]

6. That the Ojai Valley Company, nor the Libbey interests, so-called, ever owned or intend to acquire, or intend that more than 500 acres of land should be served by the Water Company. [Tr. Rec. V. 1, p. 9.]

7. That demand has been made on both defendants that the shares now owned and held by the Valley Company be cancelled or put in trust for the individual owners who are stockholders in the Ojai Mutual Water Company and that if the Ojai Valley Company sells its shares of stock in the Water Company in excess of $50.00 that this would represent an unwarranted profit to the promoters of the Water Company. [Tr. Rec. V. 1, p. 13.]

8. That plaintiff is acting on his own behalf and for other individual owners of stock in the Water Company. [Tr. Rec. V. 1, p. 14.]

Plaintiff's Alleged Second Cause of Action.

1. The second cause of action is merely a reiteration in slightly different language of the proposition that the only lands entitled to water service are lands derived from the Valley Company or so-called Libbey interests. [Tr. Rec. V. 1, p. 15.]

2. That by reason of the invalid amendment to the Articles of Incorporation of the Water Company the plaintiff, and the other grantees of Ojai Valley Company and the Libbey interests have been deprived of the control of the Water Company. [Tr. Rec. V. 1, pp. 16-17.]

Plaintiff's Alleged Third Cause of Action.

1. This alleges the invalidity of the amendment of the Articles of Incorporation. [Tr. Rec. V. 1, pp. 17-18.]

Plaintiff's Alleged Fourth Cause of Action.

1. This alleges that the Ojai Valley Company will receive unwarranted and unjustified profits by the sale of the stock owned and held by it, which it is alleged are surplus shares. [Tr. Rec. V. 1, pp. 18-19.]

Plaintiff's Alleged Fifth Cause of Action.

1. This alleges that there is insufficient water in the Ojai Valley Basin and that plaintiff and the shareholders have made actual and beneficial use of the water; that no others have any rights to the use of this water. [Tr. Rec. V. 1, pp. 20-21.]

Plaintiff's Alleged Sixth Cause of Action.

1. This alleges that the shares of stock in the Ojai Mutual Water Company are appurtenant to the land but have been treated and held as personalty. [Tr. Rec. V. 1, pp. 21-22.]

Plaintiff's Alleged Seventh Cause of Action.

1. This alleges that the Ojai Valley Company has no right to own, vote or sell any of the 1300 shares of surplus stock owned by it in the Ojai Mutual Water Company and that it claims the right to and threatens to sell said stock, all to plaintiff's injury and the other shareholders in the Water Company. [Tr. Rec. V. 1, pp. 22-23.]

We have set forth the gist of the allegations of the complaint in action No. 14945, and later on in this brief will refer to the complaint in case No. 14946.

The Answer.

The answer of defendants denies generally and specifically all the material allegations of the complaint and each and every alleged cause of action therein set forth. Defendants also set up special defenses to each and every alleged cause of action that they were barred by Sections 337, 339 and 343 of the Code of Civil Procedure. [Tr. Rec. V. 1, pp. 67-68.]

The Further Separate and Sixth Defense of Defendants.

Under this defense the defendants alleged, in substance, the acreage owned by plaintiff and the shares of stock which had been issued to him for water service; also that in June, 1945, pursuant to a purchase of 20.92 acres of land the plaintiff received 20 shares of water company stock for service of water to this land. This was six years before the filing of his complaint.

This special defense further sets forth the reasons for the amendment to the Articles of Incorporation, which was done by reason of the heavy increase in population requiring the extension of water service within the service area, which comprised 2,675 acres of land, being some

2,000 acres in excess of the lands to which plaintiff claims were the only lands to which water could be furnished, namely, lands which were purchased from The Ojai Valley Company or from what he terms the so-called Libbey interests. It is further alleged that, knowing and being acquainted with these facts the plaintiff did nothing and permitted defendants to extend their water service to consumers within the service area. [Tr. Rec. V. 1, pp. 69-79.]

The Further Separate and Seventh Defense of Defendants.

Defendants also interposed a seventh defense, alleging estoppel on the part of plaintiff by reason of the facts and matters alleged and set forth in the sixth defense. [Tr. Rec. V. 1, pp. 79-80.]

The Further Separate and Eighth Defense of Defendants.

This sets up the defense of waiver as against the plaintiff. [Tr. Rec. V. 1, p. 80.]

The Further Separate and Ninth Defense of Defendants.

The gist of this defense is that by reason of the facts alleged and set forth in the Sixth Separate Defense plaintiff has acquiesced in and consented to the various acts by defendants which are complained of by him. [Tr. Rec. V. 1, pp. 81-82.]

The Pleadings in Case No. 14946.

We will not burden the Court with a paragraph by paragraph recital of the allegations contained in this second complaint. It is entitled "Action for Accounting, Injunctive Relief and for Further Relief." It contains

many paragraphs which are repetitious of the first complaint, namely, No. 14945, relative to the invalidity of the amendment to the Articles of Incorporation, and the purchase and ownership of stock by plaintiff, the complaint in action No. 14946 also alleges discrimination on the part of Ojai Mutual Water Company in furnishing and delivering water to its consumers, claiming that certain consumers have been receiving water at a lower cost than other consumers. [Tr. Rec. V. 1, pp. 3-38, Case No. 14946.]

The Answer to Complaint No. 14946.

The answer denies all of the material allegations of this complaint and sets up separate defenses of the statute of limitations and that the plaintiff knew of the existence of the amendments to the By-Laws and the purpose and reason for the same and that he accepted twenty (20) shares of stock on the basis of one share per acre some ten years after the amendment to the Articles of Incorporation, where one share per acre had been adopted and that plaintiff had been guilty of laches in now asserting any right, claim or interest that he may now have or claim to have against said defendants under what he contended to be an invalid amendment to the Articles of Incorporation. [Tr. Rec. V. 1, pp. 38-56, No. 14946.]

Following the filing of the first case, No. 14945, and prior to the filing of the second case, No. 14946, a motion was made to dismiss on the ground of failure to state a claim upon which relief can be granted, or in lieu thereof to require that the action be stated in a simple, concise and direct manner. This was denied. We make mention of this fact, however, for in the later pages of this brief we will point out the reasons why an objection to evidence was made on the part of the defendants and the correct-

ness of the Court's ruling barring the taking of further testimony and the dismissal of said actions at the time of trial. [Tr. Rec. V. 1, p. 55, No. 14945.]

An Analysis of the Complaints in Actions Nos. 14945 and 14946 Plainly Shows the Correctness of the Court's Action in Barring the Taking of Further Testimony in These Cases.

The whole theory of appellant's complaint upon which he bases his cause of action is the fact that when the Ojai Mutual Water Company was organized that stock in this company could only be sold to those who derived title from The Ojai Valley Company, the Ohio corporation, or from what plaintiff repeatedly refers to in his complaint as the so-called "Libbey interests." We take this to mean either Edward D. Libbey or his widow, Florence Scott Libbey.

This conception on the part of the appellant is pure fantasy and totally unrelated to the realities of the situation. It is pure fiction, conceived by the appellant, for the purpose of having the shares of stock owned by The Ojai Valley Company cancelled and declared to be surplus and no longer needed for water users or land owners within the service area. In making this contention appellant overlooks the fact that he has pleaded and set up *in haec verba* the Articles of Incorporation and the amendment to the Articles of Incorporation of the Ojai Mutual Water Company and has marked them Exhibit "A" and Exhibit "B." [Tr. Rec. V. 1, pp. 26-35.] The Articles of Incorporation of the Water Company, it will be noted, contain a mete and bound description of the area subject to water service. This area comprises 2,675 acres. Under the original Articles of Incorporation any stockholder desiring to use water was required to be the owner of one share for each one-quarter acre of land or fraction there-

of, or to state it more simply, four shares per acre. [Tr. Rec. V. 1, p. 36.]

The amendment to the Articles of Incorporation provided that the owner of land should have at least one share of stock for each acre of land or fraction thereof. The original Articles of Incorporation were filed May 22, 1920, and the certificate of the Secretary of State to the amendment of the Articles of Incorporation was filed September 30, 1935. [Tr. Rec. V. 1, p. 34.]

The complaint alleged that The Ojai Valley Company had sold approximately 300 acres of land and further, that neither The Ojai Valley Company nor the Libbey interests intended to acquire or intend that there should be served by said Water Company facilities more than 500 acres of land. [Tr. Rec. V. 1, p. 9.]

This allegation in the complaint is in direct contradiction to the Articles of Incorporation which describe the service area within which users are entitled to water, amounting to 2,675 acres and we will point out in the later stages of this brief a substantial number of water users within the area described in the Articles of Incorporation never acquired nor purchased their land from The Ojai Valley Company or from what the appellant refers to as the so-called Libbey interests, whatever that phrase connotes, or whatever is intended to be meant by it. We can only assume it means Edward D. Libbey or his wife, Florence Scott Libbey.

Appellant, however, has indulged himself and gone on the assumption that because he purchased his land from Florence Scott Libbey, the widow of Edward D. Libbey, only what he refers to as the so-called Libbey lands are entitled to water service. Nothing could be farther from

the truth, and his own complaint and Exhibits "A" and "B" attached thereto completely negatize any such theory or contention on his part.

The Testimony Produced by the Appellant on the Issue of Notice Relative to the Amendment of the Articles Entirely Failed to Establish That Notice Had Not Been Given as Required by Law.

The only attack leveled by Mr. Lucking to the amendment to the Articles of the Ojai Mutual Water Company on March 4, 1935, was that no notice of the meeting amending the Articles was given to the stockholders as required by law. There is no contention whatsoever by plaintiff that the amendment was not valid in all respects save as to the giving of notice.

The learned Judge of the Court below took evidence on this issue and listened to testimony from the witnesses produced by the plaintiff, namely, the plaintiff himself, Mr. Lucking, Charles Justus Wilcox, Charles T. Butler and Rawson B. Harmon.

The Testimony of William Alfred Lucking.

The appellant Mr. Lucking produced himself as a witness. He first testified that he never knew anything about the 1935 amendment and that he had a conversation with Mr. Harmon, in Harmon's office, wherein he stated that he, Lucking , had never known anything about the amendment to the By-Laws; that he never had any notice of it, or any understanding of it of any kind; that Harmon replied that no notice was necessary to him, Lucking, for that, to cover that amendment or that meeting of March 4, 1935 [Tr. Rec. V. 2, pp. 215-216] and that he recollected no other conversation with Mr. Harmon on this matter. [Tr. Rec. V. 2, p. 217.]

The Testimony of Charles Justus Wilcox.

The testimony of this witness was that he was president and treasurer of the Ojai Valley Company and the Ojai Mutual Water Company. He identified the minute book of the Ojai Mutual Water Company relating to the annual meeting of the stockholders on March 4, 1935. [Tr. Rec. V. 2, p. 199.] The minutes were offered and received in evidence. There was no recital in the minutes to the effect that any notice of this particular stockholders' meeting had been given. [A copy of these minutes can be found in Tr. Rec. V. 2, pp. 201-206.]

The Testimony of Rawson B. Harmon.

This witness was called as an adverse witness under Rule 43(b). Mr. Harmon testified that he had no independent recollection of the 1935 stockholders' meeting and that he had nothing to do with the Water Company at that time; that he became a stockholder sometime in 1930 and that he had no recollection whatever of having received actual written notice of a stockholders' meeting at or about that time (referring to 1935); [Tr. Rec. V. 2, p. 221]; and also that he knew of no notice having been sent out of any annual meeting to the stockholders generally. [Tr. Rec. V. 2, p. 228.] This witness also testified that the only recollection of any conversation that he had with the appellant, Lucking, was that under the By-Laws there was no obligation to give notice to the stockholders of the annual meeting and that he did not recall anything being said to him about an amendment to the By-Laws or the Articles. [Tr. Rec. V. 2, pp. 257-258.]

The Testimony of Charles T. Butler.

The testimony of this witness is found in Transcript of Record, Volume 2, pages 24-256. Plaintiff made an abortive attempt to prove lack of notice by this witness by showing that he kept a pad or pads on which he made notations from time to time of his activities. All this, the Court will bear in mind, took place some 20 years prior to the date of trial. Giving Mr. Butler's testimony every reasonable inference that it is entitled to, all that it amounts to is that he had no notation on his pad or pads or books that he had received any notice of the 1935 stockholders' meeting of the Water Company. [Tr. Rec. V. 2, p. 253.]

The Court's Ruling Was Correct That There Was No Evidence Produced by Appellant Establishing the Invalidity of the March 4, 1935, Amendment to the Articles of Incorporation.

The testimony of the witnesses above referred to on the issue of notice to the stockholders of an intention to amend the Articles of Incorporation of the Water Company clearly demonstrates that appellant entirely failed to prove the allegations of his complaint on this particular issue. If any reasonable inference can be drawn from the testimony of any of these witnesses to the effect that no notice of an intention to amend the Articles was given, we fail to see it. A reading of Mr. Lucking's testimony shows that he evidently was referring to the annual stockholders' meeting in one breath and to the meeting of March 4, 1935, in another, but Harmon had stated that no notice was necessary to him—Lucking—for that. If Harmon made any such statement it is of course not evidence that no notice was required or that no notice was given. It was purely Mr. Harmon's idea of the situation and not

concrete evidence of any kind to the effect that notice had not in fact been given of the intent to amend the Articles of Incorporation. The testimony of Mr. Harmon clearly indicates that he was talking about the annual stockholders' meeting, for which it is conceded by all parties that under the By-Laws no notice to stockholders was necessary, rather than to a meeting at which an amendment to the Articles was to come up.

Mr. Butler certainly did not add anything to the situation. His recollection was directed to the annual stockholders' meeting and not to any meeting relative to an amendment of the Articles.

We quote the Court's comment on this testimony which clearly summarized the situation, as follows:

> "The evidence which has come in here on the cause of action, relating to the alleged meeting as to the amendment, being, particularly the evidence there were other meetings, as to which there was no notice given, *was not actually pertinent evidence,* because there was no showing that those other meetings were meetings of a kind, under Section 312 required notice. (Emphasis ours.)
>
> * * * * * * * *
>
> The court finds that there is not sufficient evidence to overcome the presumption of regularity with respect to the amendment of the articles of incorporation." [Tr. Rec. V. 1, pp. 288-289.]

In coming to this conclusion the Court was amply supported by the law on the subject, expressed by Section 362b, 1933 Civil Code of the State of California. The history of Section 362b of the Civil Code shows that it was added by the Statutes of 1931, page 1814, and was in effect on the 4th day of March, 1935, the date of the

amendment of the Articles of Incorporation of the Ojai Mutual Water Company. Section 362 of the Civil Code sets forth the provisions with which it is necessary to comply relative to amending of the Articles of a corporation. Section 362a, Civil Code, specifies the vote required to amend the Articles. Section 362b, Civil Code, requires the execution and filing of a certificate by the proper officers of the corporation and the submitting of such certificate to the Secretary of State, who shall file the same and put an endorsement of filing thereon if he finds that it shows a compliance with the provisions of Section 362b. We set forth and quote that part of Section 362b, Civil Code, relating to the filing of the certificate, which at the time of the amendment to Articles of Incorpration of Ojai Mutual Water Company, March 4, 1935, read as follows:

> "362b. . . .
>
> Filing of Certificate. The certificate shall be submitted to the secretary of state, who shall file the same and put an indorsement of filing thereon if he finds that it shows a compliance with the provisions of this section. Thereupon, the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the secretary of state, *shall be evidence of the performance of the conditions necessary to the adoption thereof.* . . ." (Emphasis ours.)

The record shows that the appellant, in his amended complaint in case No. 14945, set up and attached as Exhibit "B" thereto the certificate issued by Frank C. Jordan, Secretary of State, in compliance with Section 362b,

Civil Code. [Tr. Rec. V. 1, p. 34.] This certificate reads in full as follows:

"Frank C. Jordan,
Secretary of State.

Robert V. Jordan,
Assistant Secretary of State.

Frank H. Cory,
Charles J. Hagerty,
Deputies.

State of California, Department of State

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the transcript, to which this certificate is attached, with the record on file in my office of which it purports to be a copy, and that the same is a full, true and correct copy thereof. I further certify that this authentication is in due form and by the proper officer.

In Witness Whereof, I have hereunto set my hand and have caused the Great Seal of the State of California to be affixed hereto this 28th day of September, 1935.

FRANK C. JORDAN,
Secretary of State;
By CHARLES J. HAGGERTY,
Deputy.

Filed: Sept. 30, 1935, L. E. Hallowell, Clerk; By Irene Van Fossen, Deputy Clerk."

Section 362b of the Civil Code provides that when the certificate is submitted to the Secretary of State, he shall file the same and put an indorsement of filing thereon, if he finds a compliance with the provisions of this section,

and the record shows this is precisely what the Secretary of State did. The section then provides that

> "thereupon the articles of incorporation shall be deemed amended in accordance with such certificate and a copy of such amendment and the certificate thereto, certified by the Secretary of State *shall be evidence of the performance of the conditions necessary to the adoption thereof.*" (Emphasis ours.)

The record also shows under Exhibit "B," appellant's amended complaint, case No. 14945, a compliance with Section 362b of the Civil Code by the officers of Ojai Mutual Water Company, together with the resolution of the amendment of the articles of incorporation, all of which appellant made a part of his cause of action in said Exhibit "B" referred to. [Tr. Rec. V. 1, pp. 35-40.]

Appellant's Argument That the Court's Findings of Fact With Respect to Notice Are Contrary to the Evidence, Is Without Merit.

Appellant has jumped to the conclusion that the provisions of Section 362b of the Civil Code above referred, create a presumption only. This is an erroneous conception of the situation. The language of Section 362b, Civil Code, above quoted, do not state that it is a *"presumption"* of the performance of the conditions necessary to the adoption thereof, namely, the amendment, but that it *"shall be evidence"* of the performance of the conditions necessary to the adoption thereof. (Emphasis ours.) Thus we have an express, statutory declaration that the filing of the certificate of amendment by the Secretary of State shall be *evidence* of the existence of a fact, namely, the performance of the conditions necessary to the adoption of the amendment to the articles of incorporation.

"Evidence" is defined by Section 1823 of the Code of Civil Procedure, as follows:

> "Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

A definition of the law of evidence, under Section 1825, Code of Civil Procedure, subdivision 1 thereof, reads as follows:

> "The law of evidence, which is the subject of this part of the code, is a collection of general rules, established by law:
>
> 1. For declaring what is to be taken as true without proof. . . ."

Section 1827 of the Code of Civil Procedure specifies four kinds of evidence: 1. The knowledge of the court; 2. the testimony of witnesses; 3. writings, and 4. other material objects presented to the senses.

Section 1887 of the Code of Civil Procedure defines writings as of two kinds: 1. Public, and 2. private.

Public writings are defined by Section 1888 of the Code of Civil Procedure as follows:

> "Public writings are:
>
> 1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;
>
> 2. Public records, kept in this state, of private writings."

There can be no question but that the certificate of the Secretary of State, prescribed and set forth in Section 362b of the Civil Code, is a public writing.

Section 362b of the Civil Code does not specify that the evidence of compliance with the conditions necessary to adopt an amendment to the articles of incorporation cannot be controverted or that such evidence is conclusive, but it is substantive evidence and not a presumption or inference. Being evidence of a substantive nature we are faced with two situations: First—if there was no testimony contradicting the actual fact of the giving of notice of the intention to amend the articles of incorporation, then the court's finding to the effect that notice was given, cannot be set aside. This is the situation as we have pointed out in the earlier pages of this brief and as commented on by the court. Second—if there is any evidence in the record, which we contend there is not, to the effect that no notice was given, then all we have is a conflict in the evidence and a finding by the trial court in favor of appellees is conclusive.

We have read the case of *Ariasi v. Orient Insurance Co.,* 50 F. 2d 548, cited on page 21 of appellant's brief. This case dealt with presumptions and on that phase of the case held that a mere presumption was not evidence when weighed against positive evidence to the contrary. It was a case under the National Prohibition Act and in the instant case we are not dealing with a presumption nor are we dealing with any positive evidence of any kind showing that notice was not given of an intention to amend the articles of incorporation of the Ojai Mutual Water Company.

The Certificate of the Secretary of State of the Amendment of the Articles of Incorporation of the Ojai Mutual Water Company Is Proof of the Fact of Compliance Respecting the Giving of Notice.

A comparatively recent decision of the United States Court of Appeals, Ninth Circuit, namely, *Olender v. United States of America,* 210 F. 2d 795, holds that official documents are exceptions to the hearsay rule and are admissible as proof of the facts therein stated. We take the liberty of quoting from paragraphs 11 and 12 of the headnote in that case, as follows:

> "For the purposes of applying the rule no difference has been recognized between documents of federal, state and county governments. (Citing cases.)
>
> Generally stated, the rule is that all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein. See Greenbaum v. U. S., 9 Cir., 80 F. 2d 113, 126. The reason of the rule is that it would be burdensome and inconvenient to call public officials to appear in the myriad cases in which their testimony might be required in a court of law, and that records and reports prepared by such officials in the course of their duties are generally trustworthy. Wong Wing Foo v. McGrath, 9 Cir., 196 F. 2d 120; 5 Wigmore on Evidence, pp. 1631, 1632 (3rd ed.)."

There can be no question under Section 362b, Civil Code, but that the certificate of the Secretary of State referred to in that section constitutes an official public document.

We have checked the time element respecting Section 362b, 1933 Civil Code, with the Secretary of State and

for appellant's information find that the 50th session of the California legislature convened January 2, 1933, and adjourned January 28, 1933, both dates inclusive. The second session of the 1933 legislature convened February 28, 1933, and adjourned May 12, 1933, both dates inclusive. The third session of the regular session of the 1933 legislature convened July 17, 1933, and adjourned July 26, 1933, both dates inclusive. The 51st session of the 1935 legislature convened January 7, 1935, and adjourned January 26, 1935, both dates inclusive. The second half of the 51st session of the legislature convened March 4, 1935, and adjourned June 16, 1935, both dates inclusive. Section 362b, Civil Code, shows there was no amendment at the 1933 session of the legislature and if there had been any amendment subsequent to that time by the 51st session of the legislature it would not have been effective until September 16, 1935, or in other words, ninety days following the final adjournment of the 51st session. The amendment to the articles of incorporation of the Water Company having occurred March 4, 1935, Section 362b of the 1933 Civil Code was in effect at that time.

Appellant's Argument to the Effect That There Was No Recital in the Minutes of the Giving of Notice of the Amendment to the Articles Is Unsound.

Appellant makes a very brief allusion to the fact that there was no recital in the minutes that notice was given. This failure in nowise invalidates the minutes or is it any evidence that notice was in fact not given. The mere omission to insert in the minutes a recital to the effect that notice was given has no bearing on the alleged invalidity of the amendment to the articles. This is the rule in both the state and federal courts. In the case of *Bank of Napa v. Ferguson Burns Estate,* 48 Cal. App. 319

(1920), a case where the minutes had not been made up the court held on page 326, as follows:

> "It is to be regretted, of course, that a more formal memorial of the proceedings was not preserved, but a record of the corporate acts and resolutions is not essential to their validity. (Citizens Securities Co. v. Hammel, 14 Cal. App. 564, 112 P. 731; Boggs v. Lakeport etc., 111 C. 354, 43 P. 1106.)"

A reading of the case of *Central Trust Co. v. Southern Oil Corp.*, 8 F. 2d 338 (1925), indicates that the same rule obtains in the federal courts, quoting from page 346 of the opinion, where the court discussed the necessity of making up a record after the meeting, the court held as follows:

> "The Inter-Ocean Company's board of directors made up its records after the meeting authorizing the giving of the lease, but the board of directors of the Southern failed to make a record authorizing its acceptance. It, however did accept, took possession of and operated the leased plant. In doing so it gave its notes and pledged its bonds. The failure of its board to make a record, as it should have done, was not an indispensable requirement and did not render invalid and abortive all of these transactions."

Whether Said Actions 14945 and 14946 Are Properly Pleaded Class Actions Does Not in Any Way Affect the Failure of Appellant to State a Claim Upon Which Relief Can Be Granted.

On pages 22 and 23 of his opening brief appellant cites authorities in support of the proposition that both cases are properly pleaded class actions. Whether they are or not does not relieve appellant from setting forth a claim upon which relief can be granted. Appellant cites a por-

tion of Rule 23, Federal Rules of Civil Procedure, on page 22 of his opening brief as justification for his so-called class or derivative suit. Appellant does not allege in his complaint, nor have appellees ever received any complaint of any kind or nature relative to the conduct and management of the affairs of the Ojai Mutual Water Company from the time of its organization.

Appellant entirely failed to set forth with particularity the efforts of appellant to secure from the managing director or trustees *and if necessary from the shareholders such action as he desires* (emphasis ours) and the reasons for his failure to obtain such action or the reason for not making such efforts. Appellant, however, states that he represents himself and the other shareholders. Taking him at his word he, of course, only represents those stockholders other than the appellee, The Ojai Valley Company and he seeks to excuse himself from a compliance with Rule 23 by contending that it would have been futile for him to have demanded of The Ojai Valley Company such action as he desired by reason of the fact that the appellee, Valley Company, is a majority stockholder. Therefore appellant must be representing the minority stockholders of the Ojai Mutual Water Company but he makes no allegation in his complaint that he has made any demand upon any of the minority shareholders to join with him or to take such action as he, appellant, desired. Appellees do not hesitate to assert that appellant could find no such stockholders to join him in any such action or produce any stockholder who could honestly claim or assert that he has been treated in a high-handed, arbitrary

or dishonest manner by appellees, or either of them. Appellees are confident that this is not a genuine class suit, irrespective of any of the allegations set forth in appellant's complaint. We quote that portion of Rule 23, Federal Rules of Civil Procedure, as follows:

> "The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

We make the further observation that if appellant is excused from setting forth with particularity his efforts to secure from the managing director or trustees the action that he desired, then certainly it became necessary that he do so from the shareholders. His complaint contains no allegation to that effect.

The Fact That the District Court Sat as a Court of Equity Did Not Entitle Appellant to Have His Case Heard When No Valid Claim Upon Which Relief Could Be Granted Had Been Alleged.

On pages 24 and 25 of appellant's opening brief he refers to certain equitable principles about equity once having assumed jurisdiction will retain it to the end in order to award complete relief. There is no question involved in this case relative to general principles of equity but as we have already, and will hereafter point out, there was no claim before the court upon which the court would be justified in granting relief, except as to the question of the amendment of the articles of incorporation, and upon that issue the court took testimony and found against the appellant.

Appellant's Complaints Do Not State Claims Upon Which Relief Can Be Granted.

On pages 25, 26, 27 and 28 of appellant's opening brief certain authorities are cited relative to the fiduciary character of a majority stockholder or officer or a director of a corporation and that he may put himself in a position of trust with relation to minority stockholders and that where the fiduciary relationship exists the acts and conduct of such majority stockholder will be carefully scrutinized. It is true that under proper circumstances the court will disregard the corporate entity where fraud and bad faith are present and appellant makes the further argument that it wouldn't have made any difference if notice of the amendment to the articles of incorporation had been given because at the time of the amendment on March 4, 1935, the appellee, The Ojai Valley Company owned a majority stock interest in the Ojai Mutual Water Company, but appellant completely overlooks the fact that there was nothing relative to the amendment that in any way added to or made more certain the majority control of the Ojai Valley Company with respect to this stock. The service area of the corporation, as set forth in the articles contains 2,675 acres of land. The reasons for the amendment were alleged and set forth in appellees' answer under the further separate and sixth defense and answer to plaintiff's complaint. [Tr. Rec. V. 1, pp. 69-79.] The substance of this defense is that the articles were amended to provide one share per acre of land, or fraction thereof, rather than four shares per acre, by reason of the heavy increase in population on the Ojai area and that many persons, firms and corporations had purchased land in the area exclusive of land owned or held by the appellees and that in order to give the stock a wider spread and to accommodate more purchasers and

water users, further that many purchasers of water stock on the basis of one share per acre had constructed valuable and extensive improvements, agricultural, commercial, industrial and otherwise, within the service area, all with the full knowledge and acquiescence on the part of appellant, and that appellee, Ojai Mutual Water Company, was compelled to and has expended large sums of money to construct, maintain and repair the necessary facilities required by and under its original and amended articles of incorporation, to furnish water service to qualified persons, firms and corporations within the service area.

Both of Appellant's Complaints Are in the Same Category Insofar as Failing to State a Claim Upon Which Relief Can Be Granted.

Appellant waited until shortly before case No. 14945 was to go to trial and then filed case No. 14946, setting up the same exhibits to case No. 14946 as those set up in case No. 14945, and the two cases were finally consolidated for trial. The same situation exists in case No. 14946 relative to the appellant's contention that only those are entitled to water who derived title to their lands from the so-called Libbey interests and the same arguments relative to the court's action in dismissing case No. 14945 for failure to state a claim upon which relief can be granted, are applicable to case No. 14946.

Appellant's Own Complaint Shows That He Owned Stock in the Ojai Mutual Water Company, Both Before and After the Amendment of March 4, 1935.

As late as May 21, 1945, appellant purchased 20.82 acres of land within the service area of the water company and received Certificate No. 195 for 20 shares of the capital stock of Ojai Mutual Water Company. [Tr. Rec. V. 1, pp. 7-8.] This last acquisition of water stock by

appellant occurred more than ten years after the March 4, 1935, amendment to the articles of incorporation and appellant has received and accepted water service from the water company on the basis of one share per acre on the land purchase last referred to, without any objection, and this situation continued up to the time of the filing of the original complaint on June 12, 1951.

Appellant's Argument on Fraud, Dishonesty, Overreaching and Breach of Fiduciary Duty Is a Perfect Example of Ignoring the Real Situation Set Forth in His Complaint.

Appellant's tactics in this regard remind one of shooting shrapnel or a spray nozzle technique, hoping that something might be struck by a stray bullet or some bit of spray reach its target.

We ask the Court—how could there be any dishonesty, fraud or breach of fiduciary duty by reason of the amendment of the articles of incorporation? Who was prejudiced thereby? Who was deprived of any rights in or to his property in the service area or his stock in the Ojai Mutual Water Company? It was an ordinary and prudent thing to do from the standpoint of affording to the greatest number within the service area the right to purchase stock and receive water. Under the original articles it would have taken four times as much stock to accomplish this purpose as under the March 4, 1935, amendment. It created a situation where in order to meet increasing demands of new residents within the area a solution was required in order to issue stock without the issuance of new or additional stock over that which had been originally authorized. Yet appellant sees in this situation fraud, breach of fiduciary duty and overreaching. As heretofore pointed out in this brief the only attack leveled on the amendment by appellant is that of lack of notice. Yet he

is endeavoring to twist and turn the admitted facts set forth in his pleadings into a situation entirely different from the realities of the case in order to accomplish his purpose, namely, the cancellation of the stock owned by the appellee, The Ojai Valley Company.

Appellant accepted 20 shares of stock on the basis of one share per acre ten years after the amendment and six years before he filed his lawsuit. He is bound by the allegations of his complaint but the appellees are not bound by his reckless statements and unfounded charges of fraud, breach of fiduciary duty, etc.

It was one thing for appellant to indulge himself in his opening brief by asserting lofty principles of equity when he himself is waging a campaign against the appellees to deprive them of their valuable property rights which they have owned and held for over thirty years and administered in a just and fair manner since their organization as corporate entities. Some psychologist might define this as an example of defense mechanism on the part of appellant by charging fraud, dishonesty and breach of fiduciary duty against the appellees, when as a matter of fact his own conduct should be as carefully scrutinized as he wants the court to scrutinize the conduct of appellees.

We have checked the cases cited on pages 25, 26, 27 and 28 of appellant's opening brief and can find no basis to criticize any of them in so far as the law announced in those cases relate to the facts upon which the respective decisions were based. The case of *Subin v. Goldsmith,* 224 F. 2d 753, was a case where the plaintiff sought an injunction against the defendant company and its directors from holding a stockholders' meeting to approve a contract for the purchase of certain assets of Diamond Hosiery Corp. This was a derivative action under Fed-

eral Rules of Civil Procedure, Rule 23(b) (28 U. S. C. A.) Under the facts of the *Subin* case the court held it was a properly brought derivative action, but we are unable to follow appellant's contention that the *Subin* case is an authority in anywise controlling in the instant case. The facts out of which that litigation arose are entirely at variance with any of the facts before the court in the case at bar.

Perlman v. Feldman, 219 F. 2d 173, cited on page 27 of appellant's opening brief, was a derivative action brought by minority stockholders of Newport Steel Corp. to compel an accounting for alleged illegal gains accruing to defendants as a result of the sale of their controlling interest in the corporation. One, Feldmann, was a dominant stockholder. The question of the fiduciary duty, trust relations, etc. arose in the *Feldmann* case. We have no such situation in the case at bar. Appellant's complaint does not allege that there has been any sale or any threatened sale by the Ojai Valley Company of its stock en bloc or otherwise, or in what respects, if any, the Ojai Valley Company has breached or violated any alleged fiduciary duty resting on it. Water service can only be extended to those who own land within the service area described and set forth in the articles of incorporation. The service area of the water company includes a substantial portion of the incorporated City of Ojai and lands adjacent and adjoining thereto, most of which are residential and users of domestic water only. It is more than unlikely that anyone is going to purchase the majority of the stock of the Ojai Mutual Water Company without having lands to put it on, but it is highly probable that new home owners going into the area will be desirous of purchasing a share of water company stock to obtain water for their homes or

residences, most of which are on lots not larger than one or two acres in size.

Another case cited by appellant on page 28 of his opening brief is *Judelson v. American Metal Bearing Company,* 89 Cal. App. 2d 256. It was there held that the complaint must allege and it must be shown that the organization of the corporation is in some manner fraudulent or prompted by dishonesty or that the corporation committed or intended to commit a fraud or that injury will be done if the corporate entity is not disregarded. There is no allegation in appellant's complaint that either of the appellee corporation were fraudulently organized or that such organization was prompted by dishonesty or that either appellee committed or intended to commit a fraud. The citing of this case by appellant is another example of his attempt to cite the law of some other case or cases to fit into the facts of his own case where there is no factual basis existent for so doing.

Appellant's Argument Under the First Cause of Action That the Amendment Is Void Is Unfounded.

On pages 29 and 30 of his opening brief the appellant again returns to his contention that the amendment to the articles is void and not voidable. We feel appellees have completely answered this argument in the earlier pages of this brief, but desire to answer every contention made by appellant, whether the argument is new or a reiteration. He cites *McDermont v. Anaheim Union Water Company,* 124 Cal. 112, on page 29 of his opening brief. In the *McDermont* case the amendment to the articles included additional lands and alleged that the amendment was adopted and filed by the directors without the consent of the authority of two-thirds of the subscribed capital stock and without the required publication of notice of intention

to amend the articles. In the instant case no such situation existed. At the meeting amending the articles of incorporation of the Ojai Mutual Water Company out of a total of 2,000 shares of stock issued and outstanding there were 1,740 shares represented at the meeting. [Tr. Rec. V. 1, pp. 35-36.] We do not think it necessary to again take up the argument on the giving of notice which we have set forth in the earlier pages of this brief.

In *Boswell v. Mt. Jupiter Mutual Water Co.,* 97 Cal. App. 2d 437, cited by appellant on page 29 of his opening brief, the questions involved were call and notice of special meetings of the stockholders and of meetings of directors relative to the levying of assessments. There was no question in the *Boswell* case but that a defective assessment had been levied where out of a total of 631 shares outstanding only 154 of the stockholders had been notified.

In citing these cases appellant simply proceeds upon the assumption that no notice was given of the amendment of the articles of Ojai Mutual Water Company when his proof on that issue entirely failed to support his contention.

Lindsay-Strathmore Irrig. Dist. v. Wutchumna Water Company, 111 Cal. App. 688, cited on page 29 of appellant's opening brief, is a case where it was held that under the Irrigation District Act mandamus is a proper remedy where a stockholder in a mutual water company is denied his proportionate share of the water.

Appellant's further contention on page 29 of his opening brief that the "essential purpose" of the water company were subverted by what appellant refers to as the "void amendment" is completely answered by the fact that the service area to which the Ojai Mutual Water Company

can furnish water, namely 2,675 acres as set forth and described in the articles of incorporation attached as Exhibit "A" to appellant's complaint, completely negatives that argument and also the argument of appellant that only those purchasing lands from the so-called Libbey interests are entitled to water from the Ojai Mutual Water Company.

The citation of *Mound Water Company v. Southern California Edison Company,* 184 Cal. 602, on page 29 of appellant's opening brief merely is authority for the proposition that a mutual water company is not a public utility and that under the factual situation of that case where certain lands were acquired by landowners with the understanding that water was to be distributed to their lands for their use would have an entirely different background than that in the instant case. The articles of incorporation of the Mound Water Company were in nowise similar to those of the Ojai Mutual Water Company and as we will point out hereafter there is no uniformity existing in California respecting the set-up of mutual water companies. They are organized under various and different plans.

The argument of appellant to the effect that the void amendment of the articles has resulted in the loss of control to the users of the water is an argument that we cannot follow. When appellee's stock is finally disposed of the 1935 amendment to the articles of the Mutual Water Company will result in a greater and wider spread of this stock among water users within the service area of the Water Company as defined and set forth in its articles of incorporation rather than would have been the case had the articles not been amended.

Appellant, however, is attempting to cancel the stock owned by appellee, The Ojai Valley Company, and deprive it of a property right to which it is as much entitled to protection of the law as that of appellant.

There Has Been No Breach or Any Threatened Future Breach of Any Agreement Between Appellees and Their Stockholders.

On page 30 of his opening brief under the second cause of action appellant again draws on his imagination in stating that there has been a breach, or threatened future breach between appellees and their stockholders of the agreement not to furnish water to any but the so-called Libbey lands. There is no such allegation in appellant's complaint, for as we have previously pointed out the articles of incorporation attached thereto as Exhibit "A" [Tr. Rec. V. 1, pp. 26-33] completely refute this statement on the part of appellant. Appellant is as familiar as the appellees are, with the fact that the service area described in the articles of incorporation embrace 2,675 acres. This is a comparatively small acreage when measured against the original acreage in the area once owned by Edward D. Libbey. *There is no allegation in appellant's complaint to the effect that appellees have ever delivered water to anyone outside the service area, or to non-stockholders, or to those who are not entitled to water service or that they have ever threatened to do so in the future.* The understanding and agreement referred to by appellant on page 30 of his brief, is, we again assert, purely the child of his imagination.

The citation on page 31 of appellant's opening brief of *Prosole v. Steamboat Canal Co.,* 37 Nev. 154, is, as appellees view it, a case supporting their position in the case before the court. The appellant Lucking has been receiv-

ing water from the water company under what he has felt free to condemn as the "void 1935 amendment to the articles" since 1945 as hereinabove set forth in this brief. Having had the water delivered to him and having accepted the water and having observed the acts of appellees in furnishing water in the service area described in the articles of incorporation, the appellant should not now be heard to deny acquiescence and acceptance by him of water for a period of years.

A reading of *Empire West Side Irrigation District v. Stratford Irrigation District,* 10 Cal. 2d 376, cited by appellant on page 31 of his opening brief, we submit is an authority in favor of appellees' position to the effect that that appellant in this case is chargeable with laches. We quote from page 382 of that opinion, as follows:

> "In addition, we are satisfied that there is ample evidence to support the lower court's finding that the appellants are chargeable with laches in the prosecution of the claim or asserted right relied on herein. As already stated, the contract between the land and water companies was executed January 8, 1906. The testimony of some of the appellants' own witnesses indicates that since that time there has been a continual controversy between the west and east side landowners over the Lemoore water, the former making yearly demands therefor. One of the appellants' witnesses testified that the east side landowners denied that the west side landowners had any right to the Lemoore water. This evidence, coupled with the inactivity of the west side landowners from the time of the order of the railroad commission in the Ferrasci case (1915) purporting to award said Lemoore water to the east side landowners, whether *res judicata* or not, discloses an inexcusable apathy and tardiness of the appellants in the prosecution of any claim

or right they may have had under the 1906 contract, in and to the Lemoore water and supports the finding of laches made against them. It must be concluded that by the commencement of this action on December 21, 1934, the appellants were seeking to prosecute, at best, a stale claim."

The appellant Lucking finds himself in the very same position on the question of laches as did the appellant in the *Empire* case *(supra)*. The appellant's complaint on its face shows that he accepted 20 shares of stock of the water company on his last purchase of land in 1945. [Tr. Rec. V. 1, pp. 7-8.] If the amendment to the articles of incorporation of the Water Company was void in 1935, it still must have been in that condition in 1945 when appellant acquiesced in taking one share of water stock per acre of land, and insofar as equity is concerned he has been guilty of either laches, waiver, acquiscence or estoppel to now deny the validity of the amendment.

Appellees in Their Answer Pleaded Sections 337, 339 and 343, California Code of Civil Procedure, Namely, the Statute of Limitations Sections.

On appellant's theory of a breach of contract, set forth in his brief, if the contract were in writing, it would be barred by Section 337, Code of Civil Procedure, within four years of the date of the breach. The breach, as we see it, under appellant's theory, occurred on March 4, 1935, when the so-called void amendment was adopted. The complaint was filed June 20, 1951. Under Section 337, Code of Civil Procedure, the statute of limitations had run four times over.

Section 339, Code of Civil Procedure, provides a three-year period for any action upon a liability created by statute, other than a penalty or forfeiture or for a tres-

pass or injury to real property or for relief on the ground or fraud or mistake. Any view that is taken of the situation, even including the allegations of fraud and mistake, where appellant waited more than three years after discovering the facts out of which the alleged fraud or mistake arose, he certainly cannot deny the fact that he must have known of it as early as his last purchase of land in 1945 when he received one share of stock per acre of land so as to obtain water service thereon, but he waited approximately six years after the 1945 purchase before filing his complaint.

Section 343, Code of Civil Procedure, reads as follows:

> "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Even under this section appellant waited more than four years after the 1945 purchase of land, on the one share per acre basis, before instituting his action.

Irrespective of appellant's contentions set forth in his brief his complaint is clearly and plainly barred by the provisions of Sections 337, 339 and 343, Code of Civil Procedure, or any or all of them. He seeks to avoid the statute of limitations by contending and arguing that only those who derive title from the so-called Libbey interests are entitled to water and that this is a continuing situation. This phase of the case is completely answered by the articles of incorporation and by-laws of the Water Company which we have heretofore discussed in detail.

Appellant's Contention That Appellees Have Been Guilty of Inequitable, Autocratic and Arbitrary Acts and Actions Is Groundless.

On page 32 of appellant's opening brief, as to his so-called fourth cause of action, appellant again feels free to charge all varieties of misconduct against appellees. Appellant's statement that the appellees, Ojai Valley Company, has made the grantees' lands and homes decrease in value, is as appellant knows, contrary to the truth and it is difficult to follow appellant's argument that the users of water have been deprived of the control of the Mutual Water Company. This idea, of course, must have been generated by appellant's false conception to the effect that no one but purchasers of land from the so-called Libbey interests are entitled to water service from the Water Company. Appellant seems to be greatly concerned over the fact that the appellee is in a position to make a profit on the sale of its shares of stock. Appellant, of course, knows better than this, for the simple reason that he is familiar with all the ramifications, records, articles of incorporation and by-laws of the Water Company and has had free access to them at any time he so desired. [See Harmon's testimony, Tr. Rec. V, 2, p. 257.] All lands in the area under discussion have increased in value by reason of the increase in population and development within the area and appellant has had as much benefit from this increase in value as have others within the service area of the Water Company.

Under the Articles of Incorporation of the Ojai Mutual Water Company the Shares of Stock Are Not Appurtenant to the Land.

Appellant's argument under the fifth and sixth causes of action on pages 33-41 of his opening brief is based upon the erroneous contention that the stock of the Ojai Mutual Water Company is appurtenant to the land of its stockholders. Here again is a plain situation of a contention made by appellant contrary to his own pleading. Exhibit "A" of the articles of incorporation of Ojai Mutual Water Company [Tr. Rec. V. 1, pp. 26-33], clearly provide that the shares of stock are not appurtenant. To settle this argument we first turn to the appropriate language of the articles of incorporation of the Ojai Mutual Water Company found on page 30, Volume 1, Transcript of Record, as follows:

> "Provided that any stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each one-quarter acre of land or fraction thereof, to which said water is to be delivered for use thereon, situated within the exterior limits of the above described property and that such land to which said water is to be delivered for use thereon shall first have been designated and listed by the company as susceptible to the use of said water by the company in such manner as the Bylaws of the company may determine. *Mere ownership of stock in said company or of land situated within the above-described limits shall not entitle a stockholder to any water whatever, unless he and his land shall be otherwise eligible.*" (Emphasis ours.)

A similar provision is found in the By-laws.

The only change in the amendment to the articles of incorporation require that a stockholder desiring to use and using said water shall be the owner of one share of the capital stock of the company for each acre of land, or fraction thereof, which is found on page 38, Volume 1 of Transcript of Record, as follows:

> "Provided that any stockholder desiring to use and using said water shall be the owner of at least one share of the capital stock of the company for each acre of land or fraction thereof. . . ."

It is clear that one can own stock in the water company without owning land in the service area and one can own land in the service area and not own stock in the water company, but no one, under the Articles or By-laws of the Water Company, can receive water service from the Ojai Mutual Water Company unless such person owns land in the servie area and stock in the Ojai Mutual Water Company. It was the clear intent of the organizers of the corporation to make the stock non-appurtenant. This was done as legally authorized by the Civil Code sections pertaining to the subject.

Where Stock Is Not Appurtenant to Land It Is Considered as Intangible Personal Property.

Where stock is not appurtenant, as in the instant case, the ordinary rule of transfer of stock as specified in Section 330.1 of the Civil Code applies. See *Palo Verde Land & Water Co. v. Edwards,* 82 Cal. App. 52.

On the other hand where the water stock is appurtenant to the land, under the Water Transfer Law (Stats. 1923, Chap. 377, p. 757); Deering's General Laws, Act 9113, it was held that a purchaser of land is entitled to have a new certificate issued in his name upon exhibiting to the

secretary of the water company of a duly recorded deed to the land to which the stock is appurtenant. The Civil Code sections here referred to are the 1933 Civil Code sections in effect at the time of the amendment of the articles of incorporation of the Water Company.

A leading California case on the subject of whether or not stock in a mutual water company is appurtenant or non-appurtenant is *Palos Verde Land & Water Co. v. Edwards* (1927), 82 Cal. App. 52. In that case the plaintiff water company sued to quiet title to some 80 shares of stock of the corporation to which it claimed title by virtue of a pledge by the original owner. The facts were that the plaintiff sold the stock in December, 1913, and certain land to which it referred, to one Bodkin, who in turn mortgaged his land and pledged the stock. He defaulted under the mortgage. Defendant Edwards subsequently became the owner of the land. The plaintiff water company claimed under the pledge. Edwards claimed that the water stock was an interest in real property and that under Section 2986 of the Civil Code that the pledge was an attempt to pledge real property under a pledge agreement and that such a conveyance or attempted conveyance was void. The sole question to be determined on appeal was whether or not the stock was appurtenant or non-appurtenant to the land. The trial court held that it was not appurtenant and gave judgment quieting title in the plaintiff. The judgment was affirmed on appeal. The court, in its decision, in referring to Section 324, Civil Code, used the following language, on page 57 of the opinion:

> "Section 324 of the Civil Code predicates the attributes of personal property to shares of stock in a water company and that such shares remain personal

property unless the corporation shall adopt and record in the office of the County Recorder a by-law that the stock shall be appurtenant to the land. It would seem, therefore, that unless such a by-law be adopted the stock must remain personal property and not become appurtenant to the land. In *Security Commercial Savings Bank of El Centro v. Imperial Water Co.,* 183 Cal. 488 (192 Pac. 22) the court intimates that stock might become appurtenant to the land without recording the by-law, but did not expressly so hold. It did not, however, intimate that stock might become appurtenant to the land without the adoption of a by-law to that effect. There is no provision in the by-laws to the effect that the water stock shall be appurtenant to the land, and of course, there being no by-law to that effect none was or can be recorded. Nor is there any evidence in the record showing that the Water Company by its acts or practices held the water stock to be appurtenant to the land upon which it is located. On the contrary, it is the uncontradicted evidence of Mr. P. R. Asmussen, auditor and assistant secretary of the company, that the company did not require evidence of title to the land in making a transfer of the stock. The company transferred the stock upon surrender of properly endorsed certificates of stock, and in making transfers of stock it was not the policy or practice of the company to require evidences of transfers of the lands to the parties to whom the certificates were to be transferred. When a deed has been presented showing a transfer of the land, the company would not transfer the stock to the grantee in the deed but only upon surrender of the original stock certificate properly endorsed, and quite frequently stock has been moved from one location to another, with the consent of the board of directors, when the certificate of stock has been surrendered property endorsed."

The court also, in commenting on the provisions of the articles of incorporation and by-laws in the *Edwards* case, used the following language, on page 59 of the opinion:

> "There are no such provisions in the articles of incorporation or by-laws in the instant case. The only provisions to be considered here are in effect: that water shall be distributed only to lands upon which has been located; that stock shall be located only upon lands owned or claimed by the purchaser and that the certificate shall contain a description of the land on which the shares are located.
>
> There is certainly nothing in any of these provisions which would prevent the transfer of the water stock to other lands or which would give to the words 'location' or 'located' the meaning of 'appurtenant' or which would give to the shares of stock the fixed character of real property, contrary to the general provision of the law defining the character of shares of stock of a corporation as personal property."

Again on page 61 of the opinion in the above case, referring to Section 324 of the Civil Code, the Court held:

> "Section 324 of the Civil Code as amended in 1895 was in force at the time of the incorporation of the respondent company, it being incorporated in 1908, and it would seem that if it were the intention of the incorporators that the stock should be appurtenant to the land they would have so provided in their by-laws and complied with the section relative to recording and thus made the stock appurtenant to the land, which the trial court found not to be appurtenant, and which we think is the correct view."

Palo Verde, etc. v. Edwards (supra), appellees respectfully submit definitely settles the argument of appellant to the effect that the stock in the Ojai Mutual Water Com-

pany is appurtenant. The articles and by-laws of the Ojai Mutual Water Company, as we have pointed out, and the settled authorities on the subject, are to the contrary.

Appellant's Contention That Because the Right to Receive Water Is in the Nature of Real Property Does Not Make Stock in a Mutual Water Company Appurtenant to the Land.

On this point we quote the case of *Wheat v. Thomas* (1930), 209 Cal. 306, quoting from page 315, of the opinion, as follows:

> "The right of a stockholder in a mutual water company to receive water by virtue of his ownership of stock is real property but the shares themselves are personalty and do not pass upon a conveyance of land unless they are appurtenant thereto; they may become appurtenant by the adoption of appropriate provisions in the by-laws of the water company under section 324 of the Civil Code, but one claiming that they are appurtenant, is required to prove it. (See 26 Cal. Jur. 449 *et seq.*, and cases in note; also Imperial Water Co. v. Meserve, 62 Cal. App. 593 (217 Pac. 548) and Palo Verde, etc. Co. v. Edwards, 82 Cal. App. 52 (254 Pac. 922).)"

Mutual Water Companies Do Not Follow a Uniform Pattern in Their Organization.

In the earlier pages of this brief we commented to the effect that mutual water companies are not organized pursuant to any set plan. Their organizations depend greatly upon the nature of the water supply, the quantity of water available, the number of its shareholders and the nature of its corporate interest in the title of the water to be supplied.

The most common form of organization is where the stockholders are issued one or more shares of stock for each acre of land which is owned in the distribution system. See *Curtin v. Arroyo Ditch Company,* 147 Cal. 337. Under such a set-up the stock may or may not be appurtenant to specific land. See *Gordon v. Covina Irrigation Co.,* 164 Cal. 88. The plan is generally best adapted to situations where the land embraced within the service area is definitely fixed in advance, for in this way the purchaser can be more certain of the amount of water that his shares will represent from year to year.

The Ojai Mutual Water Company, as can readily be seen by its articles of incorporation was organized to fit the needs of the particular area described in its articles of incorporation. As above pointed out there are 2,675 acres in the service area and a total stock issue of 2,003 shares, the 3 odd shares being qualifying directors' shares. Anyone purchasing stock in the Ojai Mutual Water Company is assured that water will not be delivered outside of the service area; that the stock is not appurtenant to the land and that stockholders, whether or not they own land at the time of the purchase of stock, will be subsequently entitled to water service if they purchase land in the service area, and they are free to sell that land if they so desire and still retain their stock in the water company and if they buy other land in the service area they would still be entitled to water service by reason of their stock ownership. There is nothing unusual in this set-up except that appellant has tried to add something to it, namely, that no one is entitled to receive water within the service area unless they have purchased land from the so-called Libbey interests. In the earlier pages of this brief we have pointed out to the court that such is absolutely not the case.

The Relation Between the Stockholders and the Corporation Is One of Contract.

We have frequently called the court's attention to the articles of incorporation of the Ojai Mutual Water Company [Tr. Rec. V. 1, pp. 26-33] and have stated that the appellant is bound by the articles and the by-laws on the fundamental legal proposition that the relation between the corporation and the stockholders is one of contract, in which the articles of incorporation, by-laws and pertinent statutes of the state are embodied and measure the rights of the shareholders between themselves and the corporation. In this respect we quote a leading case on the subject, *Schroeter v. Bartlett Syndicate Bldg. Corp. Ltd.* (1936), 8 Cal. 2d 12, quoting from page 14 as follows:

> "Appellant cites the settled rule that the relation existing between a corporation and its stockholders, is one of contract in which the charter, articles of incorporation, by-laws of the corporation and pertinent statutes of the state are embodied (Shattuck & Desmond Whse. Co. v. Gillelen, 154 Cal. 778, 783 (99 Pac. 348). . . .
>
> "The fallacy in this reasoning is that it does not take into consideration section 1 of article XII of the California Constitution, which reads: 'Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed.' This provision was also a part of the contract between the corporation and its stockholders. (Citing cases.)"

The Ojai Mutual Water Company's Water Supply Has at All Times Been Adequate and Has Been Increasing Rather Than Decreasing.

The appellant starts off on page 33 of his opening brief by stating that the Ojai Mutual Water Company is an appropriator of water and that such rights can only be acquired by putting water to a beneficial use. There is no allegation in appellant's complaint to the effect that the water company has ever made other than a beneficial use of its water. This was the situation at the time that appellant filed his complaint and he endeavored to obtain admissions under Rule 36, Federal Rules of Civil Procedure, to have appellees admit that there was a critical water shortage. [Tr. Rec. V. 1, pp. 110-111.]

In truth and in fact never at any time since its organization in 1920 has the Water Company been unable to furnish water to its stockholders nor has any situation ever arisen where it has been necessary to ration water or to curtail the service of water. As appellant well knows there has been a marked substantial increase in water service by the Water Company within the service area as defined in its articles of incorporation. New homes have been constructed and purchasers are buying stock in the Water Company for water service and the so-called critical water shortage thought up by appellant is of course based on his theory that there is only enough water for those purchasing lands from the so-called Libbey interests, all of which we have heretofore pointed out is untenable. There has been a substantial increase in the water supply in the area where the water company's wells are located by reason of water delivered to the area from the Matilija Dam and the water level in the water company's wells has risen instead of lowered, despite the increased demand

for the water. Some of the very first users of this water did not acquire title to their lands from the so-called Libbey interests and a substantial number of stockholders and water users in the service area do not derive their titles through the so-called Libbey interests, a fact well known to appellant, yet appellant boldly asserts, contrary to the facts, and contrary to the articles, that only those who obtain title from the Libbey interests are entitled to receive water from the Water Company.

Another glaring defect in appellant's position is that in asserting that he represents the stockholders of the Ojai Mutual Water Company in a class or derivative action that he must of necessity be representing stockholders in the water company, some of whom acquire title from the so-called Libbey interests *and others who did not acquire their titles from the so-called Libbey interests.* We do not know what will be the position of the stockholders who did not acquire lands from the so-called Libbey interests when and if ever they become aware of the fact that appellant contends he represents them in a class or derivative suit, for if appellant is successful in his contention then a large group of stockholders will be denied water service who did not acquire title from the so-called Libbey interests.

In the First Instance Whether the Water Company Is or Is Not an Appropriator of Water Is Outside the Issues and Has No Real Bearing on the Merits of This Appeal.

As appellant well knows there is a wide diversity of opinion as to where the watershed lies within which the Water Company's wells are located or how extensive are the underground waters within the area, sometimes referred to as the Ojai basin or whether or not the Ojai basin is a true geological basin or merely referred to as

such for purposes of identification. It would require a geological study to determine these factors. Appellant is in no more a position than are appellees to claim or assert that the only water rights enjoyed by the Ojai Mutual Water Company are rights by appropriation, or are those which, in whole or in part, attach to an overlying landowner or a riparian owner. In any and all events appellant's contention respecting water comes back to his untenable proposition that only those are entitled to water within the service area who derived title from the so-called Libbey interests.

Appellant on page 35 of his opening brief cites *Pacific States Savings and Loan Corporation v. Schmitt,* 103 F. 2d 1002, and *Twin Falls Land and Water Company,* 79 F. 2d 431, as authority for the proposition that the shares of stock in the Ojai Mutual Water Company are appurtenant to the land. Those cases were decided under an entirely different set of facts and statutory provisions and do not apply to the instant case. We feel the argument on the question of appurtenancy or non-appurtenancy of the Ojai Mutual Water Company stock to the land has been completely covered in the earlier pages of this brief.

Appellant's Contentions Under the Sixth Cause of Action Are a Reiteration of His Argument on the Appurtenance of the Water Stock to the Land Which It Serves With Water.

On pages 36 and 37 of appellant's opening brief he again comes back to the proposition that the stock in the Water Company is appurtenant. We again refer the court to the earlier pages of this brief on the proposition that the stock is not appurtenant to the land. Appellant, in citing *Smith v. Hallwood,* 67 Cal. App. 777, on this subject, failed to point out to the court the language on page 782, where the court squarely held that the stock was not made

appurtenant under the provisions of the amended by-laws and those of Section 324, Civil Code, using the following language:

> "Clearly the Smith stock was not made appurtenant to any of his lands under the provisions of the amended by-laws and those of section 324 of the Civil Code. Appellants contend that they have acquired a right to the continued use of water under the provisions of section 552 of the Civil Code. That section is not applicable, however, because it is limited to 'any corporation' which 'furnishes water to irrigate lands which said corporation has sold.' The defendant has sold no lands. Whether or not, then, Smith's stock became appurtenant to his land was a question of fact to be determined by the trial court from the acts of himself and the defendant and the manner in which water was furnished and used upon the Smith lands and those of other stockholders. (Estate of Thomas, 147 Cal. 236, 81 Pac. 539; Wiel on Water Rights, 3d ed., sec. 550.) It cannot be said that the evidence is insufficient to justify the court in finding as a fact that the Smith stock did not become appurtenant to the lands of plaintiffs. It follows that such stock is personal property, and therefore, did not pass to plaintiffs by the mere conveyance to them of their lands."

Appellant cites *Franscioni v. Soledad Land & Water Co.*, 170 Cal. 221, on page 36 of his opening brief and as we read that case it is not authority for appellant's contention that the shares of stock in the instant case are appurtenant to the land. It was merely held in the *Franscioni* case that the defendant was a public service water company and the plaintiff was entitled to water therefrom for irrigation on his lots by paying the rates established by law. We are unable to appreciate the application of that case to the case at bar.

Appellant's Attempt to Bring the Instant Case Within the Provisions of the Carey Act, Cannot Be Sustained.

On pages 37 to 41, inclusive, of his opening brief appellant contends that cases arising out of the Carey Act (43 U. S. C. A., Sec. 641) Chapter 14, entitled "Grant of Desert Land to State for Reclamation," are applicable to the case at bar. With this contention we cannot agree. A reading of appellant's citations on this subject again brings us back to appellant's fundamental contention, namely, that no water can be delivered to anyone except those who have obtained their lands from the so-called Libbey interests, thus entirely ignoring a large block of stockholders who are receiving water and who did not acquire title from the so-called Libbey interests.

We are not going to burden the court with the relation existing between parties holding land under an act of Congress known as the Carey Act. Under the Carey Act the Secretary of the Interior, as we understand it, is empowered to adopt certain rules and regulations for the reclamation, settlement and entry of certain arid public lands and to prescribe the form of contract between the United States and the States in carrying out the provisions, objects and purposes of the Carey Act. All such contracts are to be read together in connection with the standard imposed by the acts of Congress and the statutes of the States to which they refer. See *Carter v. Blaine County Investment Co.,* 45 F. 2d 643, cited on page 37 of appellant's opening brief. We quote from page 645 of that opinion, as follows:

"The basic question in this litigation is the relation of the parties to and under the act of Congress, known as the Carey Act, which authorized the Secretary of the Interior to contract with the state of Idaho for the reclamation of arid public lands of the United States, and for the settlement thereof by actual settlers. 43 USCA pp. 641-648. The Secretary of the Interior, pursuant to the act, adopted certain regulations for the reclamation, settlement and entry of public lands and prescribed the form of contract between the United States and the states in carrying out the purpose of the act. After the contract between the government and the state was entered into, contracts between the state and the construction company and between the construction company and the settlers were entered into, which are subject to the provisions of the said act and the regulations prescribed by the Secretary. These contracts are to be read together in connection with, and the standard imposed by, the acts of Congress and the statutes of the state to which they refer. Such statutory provisions are a part of the contracts, and are to be read into them, and, when the act of Congress is considered in this light, and its requirements which are at the foundation of such a project, a federal question arising under the laws of the United States is presented."

We humbly submit that no such situation exists in the instant case. Neither appellee, nor their stockholders are settlers of reclaimed, arid land under the Carey Act, nor has the Secretary of the Interior any control over the lands involved in the instant case.

Water Under the Carey Act Is Devoted to Public Use Subject to Public Control.

Under California law the waters of a mutual water company is not devoted to public use nor subject to public control. This is another sharp distinction existing between cases cited under the Carey Act on pages 38 and 39 of appellant's opening brief and the California cases on the subject. In the earlier case of *McFadden v. County of Los Angeles* (1888), 74 Cal. 571, quoting from the syllabus of the opinion, which we submit clearly states the law, the court held as follows:

> "A corporation organized for the purpose of supplying water for the use of the owners and occupants of land within a particular district may adopt by-laws limiting the right to use the waters of the corporation exclusively to its own stockholders on lands owned by them."
>
> "The board of supervisors of a county have no power, either under section 1 of article 14 of the constitution or the act of March 12, 1885, to fix the water rates of a corporation which acquires and holds water solely for the use of its stockholders, and not for sale, distribution, or rental to the general public and which does not sell, rent, or use its water in any way so as to accumulate a fund for the payment of dividends."
>
> "A stockholder of a corporation is bound by its articles of incorporation and its duly and regularly adopted bylaws, whether he has signed them or not."

See, also:

Mound Water Company v. Southern California Edison Company, 184 Cal. 602 *(supra).*

Conclusion.

Appellant's Contention That the Ojai Mutual Water Company Was Formed for the Purpose of Supplying Water to the Lands of Mr. and Mrs. Edward D. Libbey, Referred to as the So-called Libbey Interests, Is Purely Fiction.

1. The articles of incorporation of the Water Company and the amendment thereto completely refute this contention.

2. From the date of its incorporation, up to the present, stock in the Water Company has been purchased by those living in the service area described in the articles of incorporation who did not acquire their lands from the so-called Libbey interests. These stockholders have been receiving water on the same basis as those acquiring title to their lands from the so-called Libbey interests.

3. The argument that the amendment to the articles of incorporation was for the purpose of insuring control in the Valley Company is fallacious. The articles were amended for the sole purpose of giving a wider spread to stockholders within the service area on account of the increase in population and demand for water. This obviated to some extent the necessity of issuing new stock to take care of new water users within the service area.

4. At no time in the history of the entire transaction did the so-called Libbey interests, or the Valley Company, ever own a majority of the acreage within the service area. The fact that the Valley Company owned a majority of the stock was in no way related to its ownership of land in the service area. It owned a majority of the stock at the time of the amendment and also after the amendment. The stock, being non-appurtenant to the land, was in no position to demand water service until someone owning

land in the service area had purchased it and was in a position to request water service.

5. The mere ownership of stock in the Water Company without ownership of land in the service area does not entitle one to water service. There must be a union of ownership of stock in the Water Company and land in the service area before one is entitled to water service. This is expressly spelled out in the articles of incorporation. The mere fact that The Ojai Valley Company can transfer these shares of stock to anyone it chooses is meaningless, for no one would purchase stock in the water company unless he also owned land in the service area and then he would be entitled to one share for each acre of land in order to obtain water service.

6. The amendment to the articles was challenged only on the ground of lack of notice. This was the theory upon which it was presented to the trial court. Appellant is shifting his position on appeal, now claiming that irrespective of whether notice of the amendment to the articles was given, that the amendment is still void. The reason for the amendment has been fully explained.

7. Appellant, according to his own complaint, ten years after the adoption of the 1935 amendment to the articles, purchased land in the service area and received stock on the basis of one share per acre of land, and went along for many years before expressing his ideas in his complaint, charging fraud, dishonesty, overreaching, mishandling and other claims of wrongful acts on the part of appellees.

8. Appellant's concern for the minority stockholders ignores the fact that many of these minority stockholders did not acquire lands from the so-called Libbey interests or the Valley Company, yet have been receiving water

since 1920 on the same basis as those acquiring their lands from the so-called Libbey interests. Appellant's allegations respecting a class or derivative action is an allegation only. Appellant does not point to one complaint over the years ever made by any stockholder to the Water Company, expressing dissatisfaction with its operation or management, and it is indeed passing strange that the terrible situation set forth by appellant has not resulted in a swarm of lawsuits by the injured stockholders to correct their grievances, yet we find appellant the only complainer of the alleged sinister conduct on the part of appellees.

9. At the time of the trial the learned trial judge quickly saw through the fallacious and insupportable contentions of the appellant respecting the various causes of action alleged and set forth in his complaint, and dismissed them on the ground that they did not state claims upon which relief could be granted, yet at the same time took testimony on the issue of the 1935 amendment to the articles of incorporation, which he found to be valid on the question of notice, that being the only point toward which appellant directed his proof.

The record discloses that the action of the trial court should be affirmed.

Respectfully submitted,

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